

TAN (Migration) [2018] AATA 505 (8 January 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs YIAN LING TAN

CASE NUMBER: 1601073

DIBP REFERENCE(S): BCC2014/3578218

MEMBER: Margie Bourke

DATE: 8 January 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2) and cl.820.221 of Schedule 2 to the Regulations.
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Statement made on 08 January 2018 at 10:26am

1. CATCHWORDS

Migration – Partner (Temporary)(Class UK) visa – Subclass 820 (Partner (Temporary)) – Extensive materials provided in support – Favourable decision without proceeding to a hearing – Limitation on sponsorship within five years of sponsoring another spouse – Five years lapsed at time of review – Sponsorship requirements met – Spousal relationship requirements met

2. LEGISLATION

Migration Act 1958, ss 5F, 65, 360(2)

Migration Regulations 1994, rr 1.03, 1.15A, 1.20J, 1.20KA, 1.20KB, 1.20KC, Schedule 2, cl 820.211, cl 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision of a delegate of the Minister for Immigration on 29 January 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant applied for the visa on 24 December 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.221 because the delegate was not satisfied that the applicant met the sponsorship requirements in r.1.20J.
6. The tribunal has considered the matters in the Department decision record dated 29 January 2016, the extensive materials provided by the applicant to the tribunal, and the consequence of the passage of time on the engagement of r.1.20J in this case. I am satisfied that I can make a decision favourable to the applicant on the information available to me without proceeding to a hearing, pursuant to s.360(2) of the Act. The following are reasons that the tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The two main issues in the present case are whether the applicant meets the sponsorship requirements and whether the applicant is the spouse of the sponsor.

SPOUSE/DE FACTO (cl.820.211(2)(a) and cl.820.221)

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clauses 820.211(2)(a) 820.221 require that at the time of application and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Based on the certificate of Australian citizenship granted 14 November 1995, I am satisfied that the sponsor is an Australian citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. I have considered the sponsor's two previous divorce certificates. I have considered the certificate of marriage, and statements and photographs, and I am satisfied the parties married in Melbourne on 8 December 2014. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

11. I have considered the documents and information provided to the tribunal. I am satisfied that the parties have joint bank accounts, they both contributed to the costs of the wedding, the parties do not have debts, and that both the parties have named the other as the beneficiary of their insurance and their superannuation. I am satisfied that the parties share daily expenses and contribute to their travel and household expenses. I am satisfied the applicant has moved to Australia and currently is not employed but is doing volunteer work.
12. Based on the evidence of the financial aspects of the relationship, I am satisfied the parties are in a genuine and continuing relationship at the time of application and at the time of decision.
13. I have considered the statements, information and photographs in relation to the nature of the parties' household. I accept the parties reside in Melbourne in the home owned by the sponsor prior to the applicant moving to Australia. I am satisfied the parties share some household tasks like gardening, the applicant does most of the cooking and cleaning and shopping and the sponsor does most of the laundry tasks. I am satisfied the parties have arranged renovations to the home. I am satisfied the parties reside with the sponsor's two sons who are at university, and are regularly visited in their home by other family members and friends.
14. Based on the evidence of the nature of the household I am satisfied that the parties are in a genuine and continuing relationship, and the parties live together, and not separately and apart, on a permanent basis, at the time of application and at the time of decision.
15. I have considered the statements of the relationship by the parties. I have considered the evidence of travel they have undertaken together, including to visit various family members. I have considered statements by family members and friends. I have considered the photographs of the parties with many different people in various locations. I have considered evidence of communication between and to the parties. I am satisfied the parties represent themselves to family, friends and their community as a married couple. I am satisfied the parties undertake many social activities together, including attending family functions, travel, and renovating their home. I am satisfied the parties are accepted by their families as a married couple.
16. Based on the evidence of the social aspects of the relationship, I am satisfied the parties are in a genuine and continuing relationship, and have a mutual commitment to a shared life as husband and wife to the exclusion of all others, at the time of application and at the time of decision.
17. I have considered the statements of the parties, and the extensive evidence of the relationship provided to the tribunal. I am satisfied the parties see their relationship as a long term relationship. I am satisfied the parties provide support to each other, including

travelling overseas to attend the funerals for their partner's relatives. I have considered the duration of this relationship, and am satisfied that this relationship commenced in 2012, and has been a spousal relationship since 2014.

18. Based on the evidence of the parties' commitment to each other, I am satisfied that the parties are in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife, to the exclusion of all others, at the time of application and at the time of decision.
19. I have considered the circumstances of the relationship as required in r.1.15A(3), and I am satisfied that the parties meet the definitive requirements for a spousal relationship in s.5(2) (b)-(d) at the time of decision.
20. Therefore the applicant meets the requirements in cl.820.211(2)(a).

IS THE APPLICANT SPONSORED?

21. At the time of application, the applicant meets one of several alternative sub criteria. These include 820.211(2)(c) which requires that the applicant was, at the time of application, sponsored by the sponsor, where such person has turned 18; or where they have not, by the sponsor's parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or eligible New Zealand citizen (as defined in r.1.03 of the Regulations).
22. Based on the application forms, and the records of the sponsor's date of birth and citizenship, I am satisfied the applicant was sponsored at the time of application by the sponsor who was over the age of 18 years and who was an Australian citizen. At the time of application the applicant met the requirements of cl.820.211(c).
23. At the time of decision, the applicant must continue to be sponsored by the sponsor, and the sponsorship must have been approved by the Minister and be still in force. Exceptions apply in certain circumstances where the sponsor has died, or family violence has occurred, or a child is involved.
24. Approval of sponsorship is subject to limitations contained in r.1.20J of the Regulations which sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship, and in r.1.20KA which sets a limit on the period before which certain Parent visa holders can sponsor another person for a Partner visa. There are further limits imposed by r.1.20KB in relation to sponsors charged with, or convicted of, certain offences where the visa application was made on or after 27 March 2010, and r.1.20KC for sponsors convicted of a relevant offence who have a significant criminal record in relation to the relevant offence where the visa application was made on or after 18 November 2016.
25. The issue for the applicant as identified in the Department's decision record dated 29 January 2016, was that he had lodged a previous sponsorship application on 21 February 2012. The application for the matter which is the subject of this review was lodged on 31 December 2014. R.1.20J(1) requires that a Minister not approve a sponsorship of an applicant (b) if another person has been granted a relevant permission in the circumstances of [a spouse, de facto partner or prospective spouse] not less than five years has passed since the date of making the application for that relevant permission. R.1.20J(2) states that the Minister may approve the sponsorship of an applicant for the visa if there are compelling circumstances affecting the sponsor.

26. The delegate in the Department decision record dated 29 January 2016 found the sponsorship of the applicant was within five years of the sponsor having sponsored another spouse application which was granted; and the delegate was not satisfied that compelling circumstances existed.
27. The situation in the matter before the tribunal is that the period of five years is calculated from when the previous sponsorship was made, (21 February 2012) to the time of this decision, which is now 2018. The period of five years has now lapsed, and the therefore r.1.20J is not engaged. The five year period has ceased, and the limitations imposed by r.1.20J do not apply.
28. I have considered the age, identity and citizenship of the sponsor. There is no evidence before me that indicates the sponsorship should not be approved by the Minister.
29. On the evidence before the Tribunal the requirements of cl.820.211(2)(c) are met at the time of application, and continue to be met at the time of decision.
30. **Do the requirements of cl.820.211(2)(d)/Schedule 3 apply?**
31. There is no evidence before me that the applicant has not been the holder of a substantive visa at the time of application. Based on the evidence before me, the requirements of cl.820.211(2)(d) do not apply.
- 32.
33. **Conclusions**
34. For all the above reasons the tribunal is satisfied that the applicant meets the requirements of cl.820.211(2)(a), (c) and (d) at the time of application. Therefore the applicant meets the requirements of cl.820.211(2). Based on the evidence before me the applicant continues to meet these requirements at the time of decision.
35. For all the reasons set out above the tribunal is satisfied that the applicant meets the requirements of cl.820.211(2) at the time of application, and continues to meet these requirements at the time of decision. Specifically the tribunal finds that the applicant meets the sponsorship requirements at the time of decision.
36. On the evidence before the tribunal the requirements of cl.820.211(2) and cl.820.221 are met.
37. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
- 38.

DECISION

39. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) and cl.820.221 of Schedule 2 to the Regulations.
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Member

Margie Bourke

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).